

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1314

To be argued by
STEVEN M. SCHATZ

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1314

UNITED STATES OF AMERICA.

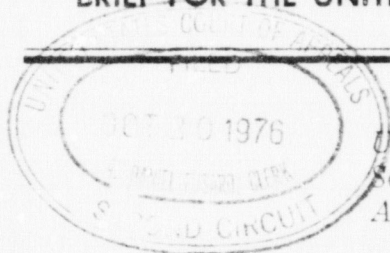
—v.—

SERAFINO SALIDINI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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**United States Court of Appeals
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Docket No. 76-1314

UNITED STATES OF AMERICA,

Appellee,

—v.—

SERAFINO SALIDINI,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Serafino Salidini appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on July 8, 1976, following a four-day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 76 Cr. 268, filed March 17, 1976, charged Salidini, John Buckley and James Brady in Count One with conspiracy to distribute narcotics in violation of Title 21, United States Code, Section 846. Counts Two and Three charged, respectively, that the defendants distributed and possessed with intent to distribute approximately twenty and forty-nine grams of heroin hydrochloride in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2. Count Four charged the defendants with possessing with intent to

distribute approximately sixty-six grams of heroin hydrochloride, in violation of Title 21, Section 812, 841(a)(1), 841(b)(1)(A), and Title 18, United States Code, Section 2. In Count Five, Salidini was charged with unlawful possession of a firearm during the commission of the crime charged in Count Four in violation of Title 18, United States Code, Section 924(c)(2) and 2. On May 19, 1976, Indictment S 76 Cr. 488, was filed. The superseding indictment modified the prior indictment by charging, in Count Five, that Salidini unlawfully carried the firearm during the commission of the felonies charged in both Counts One and Four.*

Trial commenced on indictment S 76 Cr. 488 on May 24, 1976, and concluded on May 27, 1976, when the jury found Salidini guilty on all counts. On July 3, 1976, Judge Cannella sentenced Salidini to concurrent terms of imprisonment of five years on Counts One through Four and to a one-year term of imprisonment on Count Five, to run consecutively to the term of imprisonment imposed for Counts One through Four. Salidini was also sentenced to a three-year term of special parole to commence upon the expiration of his confinement. Salidini is currently serving his sentence.

Statement of Facts

The Government's proof at trial established that Serafino Salidini assisted James Brady in securing the services of John Buckley as a distributor of heroin; that during the course of the conspiracy, heroin was stored

* Defendant John Buckley pled guilty prior to trial and testified at the trial for the Government. Many of the details of the narcotics transactions were based upon Buckley's testimony. Defendant James Brady fled prior to trial and accordingly was severed from the trial. Subsequently, Brady was apprehended and he, too, now has pled guilty.

at Salidini's apartment; and that Salidini performed counter-surveillance activities while heroin sales were being transacted on the street. The evidence further showed that Salidini performed these tasks for money or at least the expectation of receiving money.

Sometime during the middle of January, 1976, Salidini telephoned John Buckley and told him that James Brady was back in New York and that he wanted to come and see him. (Tr. 89-90).^{*} Salidini and Brady arrived at Buckley's apartment where Brady removed packets of heroin from his pocket and advised Buckley that the heroin had been obtained from California. Brady and Salidini then told Buckley that Buckley could have the same deal as Salidini, namely, he could have ten \$10 bags of heroin for \$70. (Tr. 90-1). Salidini also told Buckley that "it was pretty good stuff" and that "it was better than the garbage they were selling on the streets of New York." (Tr. 91). The three defendants then tested the heroin to determine its quality after which Salidini and Brady left Buckley's apartment, leaving behind a small quantity of heroin. (*Id.*).

On February 11, 1976, Joseph Sullivan, a Special Agent with the Drug Enforcement Administration, was introduced to Buckley as a potential buyer of heroin by a Government informant at the Apollo Restaurant, located at 89th Street and Second Avenue in Manhattan. (Tr. 21, 92). Buckley advised Sullivan that for \$1,800 he could obtain an ounce of heroin that evening. (Tr. 21-2, 92). At this juncture, Buckley called and spoke to Salidini at his residence, 436 East 76th Street, and asked to speak to Brady. It was agreed that the parties would meet at 79th Street and York Avenue. (Tr. 92-3).

^{*} The abbreviation "Tr." refers to the trial transcript; "GX" refers to Government Exhibits; and "Br" refers to Salidini's brief.

After the phone call, Buckley told Sullivan that he had "just spoken with his people", and that everything was set. (Tr. 22). Buckley, Agent Sullivan and the informant then proceeded in the undercover car, a black Mercury Cougar, New York License 835YLR, to 79th Street and York Avenue. (Tr. 22-3, 93, 150-1).

After waiting in the car for about ten minutes, Buckley saw Salidini and Brady walking toward the car and advised Agent Sullivan "that's the people now, that's them". (Tr. 24, 93). Buckley then proceeded down the street with Salidini and Brady, who expressed concern both that Sullivan might be a law enforcement officer and that they had spotted police cars in the area. (Tr. 94). Salidini himself expressed concern about the informant and stated that he was "going to check him out a bit" to see if he could be "trusted". (*Id.*). While walking on the street Brady and Salidini advised Buckley that the heroin was better than the sample that had been tested in January. (Tr. 95).

At this juncture, Buckley returned to the black Cougar and told Sullivan and the informant that "his people" had detected police surveillance, and that they should continue driving until the police left. (Tr. 24-5, 95). Brady and Salidini were then observed near the intersection of 79th Street and East End Avenue peering at the passing cars. (Tr. 226-7). As Sullivan and Buckley drove east on 79th Street toward East End Avenue, Sullivan observed Brady bending down and holding a shiny object while Salidini "look[ed] around [in] all directions." (Tr. 25-6, 96). As Buckley attempted to exit the car and draw near, Brady and Salidini waved him back into the car. (Tr. 26, 96).

After circling the neighborhood for approximately forty-five minutes, Buckley left the car and called Sali-

dini and asked him whether or not they were going to transact business that night; Salidini stated that Buckley would have to speak to Brady. (Tr. 96). After a short conversation, Buckley returned to the car, which was parked around the corner from Salidini's residence on the east side of First Avenue between 76th and 77th Street. (Tr. 29-30, 97).

There then followed a series of phone conversations in which Buckley spoke to both Salidini and Brady. (Tr. 97). The deal was to be transacted in stages. Eventually, in the vicinity of Salidini's residence, 436 East 76th Street, Brady handed Buckley a tin foil packet containing a half ounce of heroin. (Tr. 98-9). Buckley then returned to the car and sold the half ounce of heroin for \$900. (Tr. 30, 99).

Following the completion of the first half of the sale, Buckley left Agent Sullivan's car, walked down the block where he observed Brady, Salidini and two others on the stoop outside of Salidini's residence. (Tr. 100). Buckley then picked up the remaining half-ounce of heroin and returned Sullivan's car, where he delivered the heroin and received an additional \$900. (Tr. 31, 101-2).

Buckley then returned to the hallway of 436 East 76th Street, rang Salidini's buzzer but received no response. (Tr. 102). Upon leaving the building, Buckley saw Salidini outside on the street, and offered him the \$900; Salidini told Buckley to "hold on to it for a while", and the two men walked around the corner to York Avenue. (Tr. 102-3). Once around the corner, Salidini put out his hand and Buckley, in turn, handed him the \$900. (Tr. 103). At this point, Salidini stated to Buckley that Buckley was making more on the deal than he was, and that Brady had run up some bills for which he had not, as yet, paid. (*Id.*). However, Salidini was hopeful that

Brady would "take care of business, he is supposed to give me some money tonight". (Tr. 105). During the talk, Salidini also told Buckley that he did not like doing business with the informant and Brady, and that he would have preferred Brady "to do business with my people". (Tr. 104).

On the evening of February 20, 1975, Buckley again met with Agent Sullivan and the informant at the Apollo Restaurant to make arrangements for the sale of three ounces of heroin. (Tr. 34, 108). After Agent Sullivan had confirmed to Buckley that he had the money for the proposed sale, Buckley called Salidini's home, Salidini answered, and turned the phone over to Brady. (Tr. 108). Buckley then left the Apollo Restaurant in his automobile and joined Brady at the corner of 76th Street and York Avenue. (Tr. 34-5, 109, 158-9).

Buckley and Brady then drove up to the Apollo Restaurant, pulled up alongside Sullivan's automobile and gestured to Sullivan to follow. (Tr. 36, 37, 109). Sullivan followed Buckley's car to 79th Street between 2nd and 3rd Avenues, where he double parked his car directly behind Buckley's. (Tr. 37-8, 110, 159, 196-7). Brady then handed Buckley a tin foil packet containing a half-ounce of heroin, and delivered it to agent Sullivan's car where he was paid the agreed price of \$900 for the half-ounce. (Tr. 38-9, 110-1). After Sullivan complained that he didn't want to wait on the street while Buckley made five trips back and forth, Buckley returned to his car. (Tr. 39, 111). Buckley then told Brady that it was ridiculous to transact the sale in so many stages. (Tr. 112). Accordingly, Brady handed Buckley the remaining five half-ounce packages of heroin. (Tr. 39, 112). In turn, Sullivan handed Buckley \$4500, which represented payment at a rate of \$900 per half-ounce. (Tr. 40, 112). After the

transaction was completed, Buckley drove Brady to 92nd Street and then dropped him off at the corner of 76th Street and York Avenue. (Tr. 113, 160). Brady then proceeded to enter the building where Salidini resided, 436 East 76th Street. (Tr. 160-1).

Approximately a week later, Buckley and Salidini transacted some additional business. (Tr. 113). Buckley called Salidini and asked if Brady had "left anything with you"; Salidini replied "just a little." (*Id.*). Buckley then went to Salidini's apartment where he obtained \$40 worth of heroin in return for \$30. Later at that meeting, Salidini exhibited to Buckley a black semi-automatic pistol. (Tr. 116).

On March 8, 1976, Buckley, Sullivan and the informant met once again at the Apollo Restaurant. (Tr. 42, 116). Buckley advised Sullivan that they were prepared to deliver five ounces of heroin and that his people wanted the transaction to be consummated somewhere in Central Park. (Tr. 42, 116). After Sullivan rejected the proposed situs of the sale, Buckley called Salidini's home and suggested to Brady that the deal be consummated at the Green Kitchen Restaurant located at the corner of 77th Street and Fifth Avenue. (43, 116). Agent Sullivan and Buckley then agreed that the sale would proceed in two stages and that, prior to entering the restaurant, Buckley would signal whether the first stage would be for two or three ounces. (Tr. 43-4). After the details were settled, Sullivan and the informant, in the black Cougar, followed Buckley to First Avenue, where Sullivan double-parked his car. (Tr. 44, 116).

At this juncture, Buckley drove to 79th Street between York and East End Avenue, where he joined Brady. (Tr. 117). The two of them then proceeded to enter a building on the corner of 79th Street and East End Avenue, and weighed the heroin to make certain that it contained a full five ounces. (Tr. 117-8).

In the interim, Agent Sullivan waited, in the Mercury Cougar, on First Avenue. (Tr. 45). While Sullivan waited, Agent John Lawler, observed Salidini exit 436 E. 76th Street, walk north on York Avenue and then walk westward on East 77th Street. (Tr. 162). Salidini continually looked over his shoulder while walking toward First Avenue. (*Id.*). Upon reaching First Avenue, Salidini took a few steps toward Sullivan's car, did a quick reverse, began running east on 77th Street, and then south on York Avenue to East 76th Street. (Tr. 45-6, 162-3).

Shortly thereafter, Agent Sullivan, with the aid of his rear-view mirror, observed Salidini behind him crouching between cars. (Tr. 46-7).*

Several minutes later, Buckley and Brady returned with the heroin. (Tr. 47). As Buckley passed Agent Sullivan's car, he took out two balloons and signalled that the first phase of the sale would be for two ounces of heroin. (Tr. 48, 119). Agent Sullivan then gave a pre-arranged arrest signal and the defendants were placed under arrest. (Tr. 48-9, 119, 199). As Agent Moran proceeded to arrest Salidini, Salidini stated that "it's in front, its in front." (Tr. 236). Moran then patted down Salidini finding a small caliber automatic pistol, "in his belt in front of his stomach." (Tr. 237-8; GX 9).**

After the arrest, Agent Victor Aponte drove Buckley's car to the Drug Enforcement Administration garage

* Agents Stephen Moran and John Costanzo, who were on surveillance duty, observed Salidini, crouching between cars and peering at the black Mercury. (Tr. 235, 249, 263). Agent Costanzo, further observed that Salidini "appeared to be writing something." (Tr. 263).

** It was stipulated that the gun was operable and that Salidini did not have a license to carry a firearm as required by New York law. (Tr. 256-8; GX 12 and 13).

where it was secured. (Tr. 199). Later that evening, Special Agent John Lawler and Richard Piano searched Buckley's automobile where they found a scale and a number of balloons contained heroin. (Tr. 164).*

While Salidini was being processed at DEA headquarters, Agent Adam Mangino asked him to empty his pockets. (Tr. 264-66). Agent Costanzo found among this material a matchbook, upon which had been written the figures 835 YLR, the licence plate number of the black Mercury that had been used in the narcotics transactions.

Salidini presented no evidence in his behalf.

ARGUMENT

POINT I

The evidence of Salidini's guilt was sufficient.

Salidini contends that the evidence of his guilt was insufficient as a matter of law and that the case should not have been submitted to the jury. He flatly asserts that "the testimony reveals that Salidini was not involved." (Br. 14). These claims are utterly devoid of merit.

The evidence at trial established that Salidini was a willing participant in a conspiracy to distribute heroin, that he helped Brady solicit John Buckley's participation in the scheme, and that he performed lookout duties during the course of the crime charged in the indictment.

* Buckley, himself testified that he flushed down the remainder of the heroin in the bathroom at the Drug Enforcement Administration headquarters. (Tr. 119).

The evidence further showed that his apartment became the focal point of the conspiracy when he permitted Brady to store the heroin there and when all three transactions charged in the indictment occurred within a few blocks radius of the apartment.*

From the time of the conspiracy's inception, Salidini performed valuable and substantial services to further this heroin scheme. It was Salidini who telephoned Buckley in January 1976 to advise him that Brady was back in New York and wanted to see him. (Tr. 89-90). Salidini then accompanied Brady to Buckley's apartment to convince Buckley to join the distribution network for the heroin. Salidini stated that the heroin was "pretty good stuff . . . better than the garbage they were selling on the streets of New York." (Tr. 91). Indeed, at this January meeting, Salidini reiterated Brady's assertion that Buckley could have the same percentage deal as he, himself, was getting. (Tr. 90-1).

On February 11, 1976, the night of the first sale, Buckley called Salidini's residence, spoke with Salidini, and then discussed the details of the sale with Brady. (Tr. 92-3). Indeed, Buckley, during the course of the

* With respect to the activities of February 20, 1976, Count Three of the indictment, the Government relied primarily on a Pinkerton Theory, and Judge Cannella so charged. (Tr. 366-7). See *Pinkerton v. United States*, 328 U.S. 640, 645-8 (1946); *United States v. Finkelstein*, 526 F.2d 517 (2d Cir. 1975); *United States v. Cobb*, 446 F.2d 1174, 1177 (2d Cir.), cert. denied, 404 U.S. 984 (1971); *United States v. Castellana*, 349 F.2d 264 (2d Cir. 1965), cert. denied, 383 U.S. 928.

We do not understand appellant to be challenging the sufficiency of the evidence with respect to Count Five, the firearms count. Salidini was arrested with a loaded, operable gun concealed on his person and it was stipulated that Salidini did not have a firearm's license as required by New York law. (Tr. 237-8, 256-8; GX 12, 13).

conspiracy, referred to "his people," (Tr. 22, 24, 93)—a statement which, in the context of the other proof, the jury could reasonably have found to refer to Salidini. See *United States v. D'Amato*, 493 F.2d 359 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). At the originally proposed location for the first sale, 79th Street and York Avenue, Salidini joined Brady in expressing concern that Agent Sullivan might be a law enforcement officer. (Tr. 94). Indeed, Salidini expressed his intention to "check" on the informant to see if he could be "trusted". (*Id.*). On the same evening, Salidini assured Buckley that the heroin was of good quality. (Tr. 95).

When the sale was finally consummated, Buckley retrieved the narcotics at 436 East 76th Street. Later that evening, Salidini accepted from Buckley \$900, which represented a portion of the proceeds from the just completed heroin sale. (Tr. 103). Although Salidini did assert that Buckley was being paid more than he was, it was clear that he expected to receive remuneration from Brady that very night. (Tr. 105).

Thus, with respect to the evening of February 11, 1976, the evidence established that: 1) Buckley referred to his source of supply as his "people"; 2) Buckley contacted Brady by calling Salidini's apartment; 3) Salidini accompanied Brady to the originally proposed location for the sale and Salidini said he would "check out" the informant to determine his trustworthiness; 4) the deal was consummated in the immediate vicinity of 436 East 76th Street; 5) Salidini accepted \$900 from Buckley; and 6) Salidini expressed hope that Brady would pay him that night. The Government submits that this evidence, even removed from the context of the other proof, which clearly demonstrated Salidini's relationship with his co-conspirators, provided a more than ample basis for conviction on both the substantive crime charged in Count Two and on the conspiracy charged in Count One.

In addition, the evidence further showed that on February 20, 1976, the date of the second sale, Buckley picked up Brady and later dropped him off at 436 East 76th Street. (Tr. 34-5, 113, 158-160). Furthermore, about a week later, Buckley relied on Salidini to obtain heroin. (Tr. 113).

Finally, on March 8, 1976, the date of the aborted third sale, Salidini was observed in various furtive activities including peering at Agent Sullivan's car on 77th Street, abruptly reversing his tracks and running completely around the block to 76th Street, and crouching between cars appearing to be writing. (Tr. 45-6, 162-3, 235, 244, 263). From this conduct, "[t]he jury could find . . . that [Salidini] acted as a lookout for the group and did not innocently go along with the others just for the ride. . . . The jury could thus interpret appellant's conduct as indicating concern about possible surveillance or interference from innocent passers—by." *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974). (Citations ommitted). *United States v. Carneglia*, 468 F.2d 1084, 1088 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973).

In addition to this evidence—sufficient in itself to support the conviction—on his person at the time of his arrest was a loaded pistol and a match book bearing the license plate number of the undercover car employed by Agent Sullivan. (Tr. 236-8, 264-66). From Salidini's possession of these items the jury could certainly infer participation in the crimes charged. See *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir. 1976); *cf. United States v. Ruiz*, 477 F.2d 918 (2d Cir.), *cert. denied*, 414 U.S. 1004 (1973).

Thus, the jury had before it powerful evidence "upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972); see *United States v. De-Garces*, 518 F.2d 1156, 1159-60 (2d Cir. 1975). Indeed,

comparable cases in this Circuit established beyond doubt the sufficiency of the proof at trial. See *United States v. D'Amato*, *supra*; *United States v. Terrell*, 474 F.2d 872, 875 (2d Cir. 1973); *United States v. Rizzuto*, 504 F.2d 419 (2d Cir. 1974); *United States v. Manfredi*, 488 F.2d 588, 596-7 (2d Cir. 1973), *cert. denied*, 47 U.S. 936 (1974); *United States v. Pui Kan Lam*, *supra*.

Relying on *United States v. Hyoshian*, 448 F.2d 343 (2d Cir. 1971), Salidini claims that at most he "was a casual facilitator". (Br. 9). This reliance is totally misplaced. In *Hyoshian*, the Court found that "merely telling a willing buyer how to make contact with a willing seller does not necessarily imply . . . an agreement between that seller and the" middleman defendant. *United States v. Hyoshian*, *supra*, 448 F.2d at 347. Here however, the evidence showed a working relationship between Salidini and Brady extending over a period of weeks and involving several separate transactions of narcotics, with Salidini performing substantial tasks in furtherance of the scheme. See *e.g.*, *United States v. Frank*, 520 F.2d 1287, 1290 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976). Indeed, both Salidini and Brady expressly alluded to their arrangement when in January they told Buckley that he could have the same percentage "cut" as Salidini. (Tr. 94). Thus, the evidence fully established that Salidini was a full participant in the conspiracy.*

* The other cases upon which Salidini relies are totally inapposite. *United States v. Falcone*, 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205 (1940), merely stands for the proposition that an individual does not become a co-conspirator or an aider or abettor by failing to "forgo a normally lawful activity, . . . the fruits of which he knows that others will make an unlawful use; he must in some sense promote the venture himself." 109 F.2d at 581. Here the evidence is overwhelming that Salidini did much to "promote the venture."

United States v. Peoni, 100 F.2d 401 (2d Cir. 1938), merely held that the original distributor of counterfeit money was not an accessory to the possession of the money by someone down the line with whom he had not dealt. Here, Salidini, had direct and continuing contact with both Brady and Buckley.

In advancing his argument concerning the sufficiency of the evidence, Salidini has failed to give "full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact." *United States v. Harris*, 435 F.2d 74, 88 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971). The attack on the sufficiency of the evidence amounts to nothing more than an attempt to have this Court sit as a "super jury", a role which this court has repeatedly declined to assume. See, e.g., *United States v. Kahaner*, 317 F.2d 459, 467-68 (2d Cir.), *cert. denied*, 373 U.S. 835 (1963). Thus, the evidence when viewed in the light most favorable to the government, is clearly sufficient to support the jury's determination of guilt. See, e.g. *United States v. Glasser*, 315 U.S. 60, 80 (1943); *United States v. McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972).*

* Without specifying any particular Request to Charge, or citing any authority, Salidini claims that the trial court "erred, especially in a case as close as this one, in refusing the Requests" (Br. 18). It is significant that following Judge Cannella's charge, defense counsel stated: "I have no exceptions. I thought your charge was eminently fair." (Tr. 372). Having failed to register his objection to the charges after its delivery, Salidini is now precluded from seeking this Court's review. See, *United States v. Leach*, 427 F.2d 1107, 1113 and n.6 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970); *United States v. Sherman*, 171 F.2d 619, 624 (2d Cir. 1948), *cert. denied*, 337 U.S. 931 (1949). In any event, as counsel stated below, Judge Cannella's charge was "eminently fair" and certainly did not constitute plain error. See e.g., Fed. R. Crim. P. Rule 30, 52(b); *United States v. Santiago*, 528 F.2d 1130, 1135 (2d Cir. 1976), *cert. denied*, 44 U.S.L.W. 3659 (U.S. May 19, 1976); *United States v. Pinto*, 503 F.2d 718, 723 (2d Cir. 1974).

POINT II**The prosecutor's summation was proper.**

Salidini apparently contends that the Government erred in its rebuttal summation. Specifically, he challenges the Government's response to defense counsel's argument that the government could have called a handwriting expert in connection with the notations on the matchbook. This contention is frivolous.

During his summation defense counsel argued:

"There is no handwriting expert produced to show that this matchbook cover and the figures thereon was the handwriting of this defendant. The Government didn't produce any such witness, and could have if they wished to." (Tr. 311).

During the rebuttal summation, the prosecutor responded as follows:

"Mr. Weisband says the Government did not call a handwriting expert. Well, ladies and gentlemen, there is no obligation on either side to do that, and ask yourselves whether the defense could have called a handwriting expert if they thought it would have been helpful." (Tr. 323).

Indicative of the baselessness of Salidini's claim is that counsel at no time saw fit to object to the remark now assigned as error in this Court. This failure to object not only shows the inoffensiveness of the remark but also precludes review in this Court, see *United States v. Canniff*, 521 F.2d 565, 572 (2d Cir. 1975), *cert. denied, sub nom. Benigno v. United States*, 96 S.Ct. 736 (1976); *United States v. Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *United States v.*

Indiviglio, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966); *cf. United States v. Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940).

In any event, the challenged statement was fair comment to defense counsel's argument. A defendant, of course, has the right not to testify at trial, and no adverse comment may be drawn from his failure to do so. *Griffin v. California*, 380 U.S. 609 (1965). However, a prosecutor may comment "upon the defense's failure to call witnesses [other than the defendant] to contradict the government's case," particularly where the defense counsel himself raises the non-production of the potential witness as an issue. *United States v. Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). See also *United States v. Noah*, 475 F.2d 688, 695-96 (9th Cir.), *cert. denied*, 414 U.S. 1095 (1973); *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1268-1270 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970).

Here, the prosecutor merely referred to the obvious fact that the defendant could have called a handwriting expert had he so chosen. This statement was entirely proper.*

* Apparently, Salidini also claims that it was error for the prosecutor to rhetorically ask the jury "what is the explanation . . . for Salidini walking in the street doing what agents described as lookout or counter-surveillance activities. . . ." (Br. 117; Tr. 326). Obviously, this statement, which was not objected to below, was merely a call for the jury to use its common sense and to draw the logical and permissible inference from the evidence adduced at trial.

CONCLUSION

The judgment of conviction should be affirmed.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

~~STEVEN X M X SCHWARTZ~~ MILDRED ROTHENBERG
~~XXXXXX X ROTHENBERG X XXXX X ROTHENBERG X~~ / being duly sworn,
 deposes and says that she is employed in the office of
 the United States Attorney for the Southern District
 of New York.

That on the 20th day of October, 1976, she served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

DAVID N. WEISBAND, ESQ.
120 Broadway
New York, N. Y. 10005

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Mildred Rathenbury

Sworn to before me this

20th day of October, 1976

Wm. C. Grampp

OLGA C. GRAMPP
Notary Public New York State
No. 43-4120338
Qualified in Richmond Cty.
Comm. Expires March 30, 1977